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MOHAMMAD TARMIMI TARMIZI

v.

PP

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HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CRIMINAL APPEAL NO: 42-02-2007-II]
27 JULY 2007

C ***CRIMINAL LAW:*** *Penal Code - Section 436 - Mischief by fire or explosive substance - Conviction and sentence, appeal against - Admissibility of confession statement - Whether proved voluntary - Evidence Act 1950, s. 24 - Failure to consider certain facts such as age of appellant when confession was made - Whether fatal - Whether* D *prejudicial effect of confession statement outweighed its probative value - Whether confession statement ought not to have been admissible - Whether conviction and sentence set aside*

CRIMINAL PROCEDURE: *Sentence - Appeal against - Offence* E *under s. 436 Penal Code - Whether confession statement admissible - Whether prejudicial effect of confession statement outweighed its probative value - Whether conviction and sentence set aside - Evidence Act 1950, s. 24*

EVIDENCE: *Confession statement - Admissibility - Whether voluntary* F *- Evidence Act 1950, s. 24 - Failure to consider certain facts such as age of appellant when confession was made before admitting confession - Whether fatal - Whether prejudicial effect of confession statement outweighed its probative value - Whether confession statement ought not have been admissible - Whether conviction and sentence set aside*

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The appellant herein was charged under s. 436 of the Penal Code. The complaint against the appellant was that he had committed mischief by burning down an office building. There was no eye witness to the incident and the only incriminating evidence which H the Sessions Judge heavily relied on was the confession statement. At the end of the prosecution's case, the Sessions Judge held there was a *prima facie* case against the appellant. Subsequently, the appellant appealed against conviction and sentence made by the Sessions Judge. The issue that arose herein was whether the I confession statement ought to have been admitted, taking into consideration the facts, *inter alia*, that (a) the appellant was only 18 years old; (b) it was not voluntarily made; (c) no evidence was

adduced to show whether the appellant had the benefit of legal advice at the time confession was recorded; (d) no evidence was adduced to show why he was detained for a period of four days before confession was recorded and (e) no reason was adduced why the confession was not recorded before the magistrate when the police had come to court to seek remand.

Held (allowing the appeal):

(1) A confession is inadmissible against the accused unless it is voluntary, in the sense that it has not been obtained from him by inducement, threat or promise made by a person in authority or by oppression (s. 24 of the Evidence Act 1950). Because confession evidence is so decisive of guilt, the law has imposed stringent requirements for admitting such evidence. (para 6)

(2) On the facts of the case and taking into consideration the age of the appellant at the time the confession statement was recorded, the Sessions Judge ought to have considered the above before ruling on the admissibility. Failing to do so before admitting the confession may be fatal. The confession statement ought not have been admissible. There was no independent evidence to corroborate the offence. The confession statement must be excluded as its prejudicial effect outweighed its probative value. (paras 6, 8 & 9)

Case(s) referred to:

Abdullah Awang Bongkok v. PP [1956] 22 MLJ 90 ***(refd)***
Dato Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***
DPP v. Ping Lin [1976] AC 674 ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Ibrahim v. R [1914] AC 599 ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 FC ***(refd)***
Mohamed Yusof v. PP [1983] 2 MLJ 167 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Chan Choon Keong [1989] 2 CLJ 216; [1989] 2 CLJ (Rep) 300 HC ***(refd)***
PP v. Law Say Seck & Ors [1971] 1 MLJ 199 ***(refd)***
PP v. Naikan [1961] 1 MLJ 147 ***(refd)***
State of UP v. Mohamed Naim AIR [1964] SC 703 ***(refd)***
Wong Kam Ming v. The Queen [1980] AC 247 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 113
Evidence Act 1950, ss. 24, 25, 26
Penal Code s. 436

Other source(s) referred to:
A Classic Display of Judicial Vigilance [1997] 1 MLJ cxxxiii
Sarkar on Evidence, 14th edn, p 367

For the appellant - Edward Usa; M/s Idris & Co
For the respondent - Mohd Mukhzany Fariz Mohd Mokhtar DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the appellant's appeal against conviction and sentence made by the learned sessions judge.

[2] The appellant was charged under s. 436 of the Penal Code. The charge reads as follows:

> That you, on the 7th day of August, 1995 at about 4.00 a.m, at Matsumura Gumi Sdn Bhd, Jalan Upland, Kuching in the State of Sarawak, committed mischief by fire intending to cause the destruction of a building to wit, an office building and that you thereby committed an offence punishable under Section 436 of the Penal Code.

[3] At the end of the prosecution's case, the learned sessions judge held there was a *prima facie* case and amended the charge to read as follows:

> That you, on or about the 7th day of August, 1995 at about 4.00 a.m at the office of Matsumura Gumi Sdn Bhd, 3rd Floor, Lot 4914, Jalan Upland Kuching, in the State of Sarawak, committed mischief by fire knowing it to be likely that you would thereby cause the destruction of a building ordinarily used for the custody of property, to wit, the said office building of Matsumura Gumi Sdn Bhd at 3rd Floor, Lot 4914, Jalan Upland, Kuching and you thereby committed an offence punishable under Section 436 of the Penal Code.

[4] The complaint against the appellant was that he committed mischief by burning down an office building. Evidence was given by 8 witnesses for the prosecution. The prosecution case was based on circumstantial evidence. There was no eye witness to the incident. None of the witnesses were able to show any nexus with the crime and the appellant except for the employer (PW1) of the accused who said that the accused was employed by his company. PW1's company was the tenant of the premise which was the subject matter of the charge. The only incriminating evidence which the learned sessions judge heavily relied on was the confession statement. If not for the confession statement, the prosecution will not have been able to establish a *prima facie* case.

[5] For the purpose of this appeal, it is necessary for me to consider whether the confession statement ought to have been admitted taking into consideration the facts that:

(i) the appellant was only 18 years old when it was recorded.

(ii) the appellant had informed the court that it was not voluntarily made. The police officers had assaulted him.

(iii) no evidence was adduced to show whether the appellant had the benefit of legal advice at the time the confession was recorded.

(iv) no evidence was adduced to show whether the parent and/or family members of the appellant were informed of the arrest.

(v) no evidence adduced to show why he was detained for a period of four days before confession was recorded.

(vi) no reason was adduced why the confession was not recorded before the magistrate when the police had came to court to seek remand.

[6] On the facts of this case and taking into consideration the age of the appellant at the time the confession statement was recorded, the learned sessions judge ought to have considered the above before ruling on the admissibility. Failing to consider the above before admitting the confession may be fatal and warrants this court, on the facts of this case, to rule that that the confession statement ought not to be made admissible in the wider interest of justice. My reasons are as follows:

(i) A cardinal rule of the English law of criminal evidence is that a confession is inadmissible against the accused unless it is voluntary, in the sense that it has not been obtained from him by inducement, threat or promise made by a person in authority or by oppression (see *Ibrahim v. R* [1914] AC 599). The rule has been codified in Malaysia by s. 24 of the Evidence Act 1950 (EA 1950). The rule is further protected by ss. 25 and 26 of the EA 1950, which provide that no confession made to a police officer who is below the rank of an inspector by a person accused of any offence shall be proved against that person; and that no confession made by any person whilst he is in the custody of a police officer shall be proved against that person unless it is made in the immediate presence of a sessions court judge or magistrate.

(ii) These statutory provisions clearly go beyond the confession rule in English law. But there is little doubt that, by enacting the wider scope of the rule in Malaysian law, our legislature has afforded greater protection to the accused. The confession rule is not without reason. The world-famous philosopher Bertrand Russel, in his book Power, observed (see *Sarkar on Evidence* (14th edn) at p 367):

> The gist of the matter is that a policeman is promoted for action leading to the conviction of a criminal, that the courts accept confession as evidence of guilt, and that, in consequence, it is to the interest of individual officers to torture arrested persons until they confess. This evil exists in all countries in a greater or lesser degree. In India, it is rampant ... . For the taming of the power of the police, one essential is that a confession shall never, in any circumstances, be accepted as evidence.

(iii) In an ideal world, justice would be better served if the state were to prove its case against the accused by relying on its powers of independent detection instead of relying on the accused condemning himself secretly under pressure in police custody, for there is a risk of agitated and frightened men admitting guilt even though innocent. Because confession evidence is so decisive of guilt, the law has imposed stringent requirements for admitting such evidence. The law's stringency against the use of involuntary confessions does not turn on their unreliability alone. It also turns on the political ethic that the police must obey the law while enforcing the law.

(iv) There is no doubt that the exclusion of involuntary confessions tends to discourage undesirable police excesses. The courts are well aware of the existence of lawlessness in law enforcement. For example, AN Mulla J of the High Court of Allahabad in India observed (in *State of UP v. Mohamed Naim* AIR [1964] SC 703):

> ... there is not a single group in the whole of the country whose record for crime comes anywhere near the record of that organized unit which is known as the Indian Police Force.

(v) Our courts have been less strident and more subtle in their comments on the police. In *PP v. Law Say Seck & Ors* [1971] 1 MLJ 199, Sharma J said (at p 201):

> The police no doubt are an aspect of the state's ability to maintain law and order and in that sense a symbol of service. Yet the police also represent the force and the might of the state.

(vi) Abdul Hamid Omar LP in *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 observed:

> We are not suggesting that the practice by the local police is the same as in India; nevertheless, we are firmly of the view that in invoking s. 27 the courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of the section, which is so vulnerable to abuse.

(See article *Md Desa bin Hashim v. PP* [1995] 4 CLJ 677: *A Classic Display of Judicial Vigilance* [1997] 1 MLJ cxxxiii).

(vii) Quite recently the Attorney-General had issued a press statement that the Chambers will not rely on confession statements unless the Attorney-General consents to it or words to the effect.

(viii) The new s. 113 has diluted the concept of cautioned statement and the new amendment which has not come into force reads as follows:

> 113. (1) Except as provided in this section, no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence.

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(2) When any witness is called for the prosecution or for the defence, other than the accused the court shall, on the request of the accused or the prosecutor, refer to any statement made by that witness to a police officer in the course of a police investigation under this Chapter and may then, if the court thinks fit in the interest of justice, direct the accused to be furnished with a copy of it and the statement may be used to impeach the credit of the witness in the manner provided by the Evidence Act 1950 [Act 56].

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(3) Where the accused had made a statement during the course of a police investigating such statement may be admitted in evidence in support of his defence during the course of the trial.

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(4) Nothing in this section shall be deemed to apply to any statement made in the course of an identification parade or falling within section 27 or paragraph 32(1)(a) of the Evidence Act 1950.

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(5) When any person is charged with any offence in relation to:

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(a) the making; or

(b) the contents,

of any statement made by him to a police officer in the course of a police investigation made under this Chapter, that statement may be used as evidence in the prosecution's case.

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(ix) It will be clear by the reading of s. 113 of the CPC as it stands that there are many restrictions imposed before a cautioned statement becomes admissible. Further, it must be voluntarily given and must not be as a result of any inducement, threat or promise from a person of authority similar to s. 24 of the EA 1950. Unlike confession statement, the admissibility of cautioned statement becomes more onerous for the prosecution. The principles stated in respect of voluntariness to confession will be applicable to cautioned statement. The burden of proof lies with the prosecution to show beyond reasonable doubt that the cautioned statement was voluntary without inducement, threat or promise from a person in authority.

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[7] According to s. 24 of EA 1950, a confession made by an accused person is irrelevant if it appears to have been caused by: (i) inducements; (ii) threat; or (iii) promise. The inducement, threat or promise must: (a) relate to the charge against the accused; and (b) proceed from a person in authority and (c) must be sufficient in the opinion of the court to cause a reasonable belief in the mind of the accused that by making it he would gain an advantage or avoid an evil of temporal nature. It is asserted that the legislature has deemed it fit to use the word 'appears', emphasising the need for voluntariness and giving full authority to the court to decide in accordance with its own perception, whether the confession statement was voluntary within the spirit of s. 24. It is sufficient that if a slight doubt is created in the mind of the judge to rule, the confession is inadmissible. The EA 1950 itself does not define 'appears' 'inducement', 'threat' or 'promise.' In *Mohamed Yusof v. PP* [1983] 2 MLJ 167, Syed Agil Barakbah J (as His Lordship then was) observed:

> The word "appears" indicates a lesser degree of probability than "proved" as defined in section 3. A well-grounded suspicion based on the facts and surrounding circumstances may exclude a confession. Since proof of inducement or threat is difficult and in many cases impossible of attainment at that stage, the discretion of the court is unfettered by the concrete standard of proof necessary in other cases. The court is therefore free to scrutinize the evidence and surrounding circumstances to determine the presence or absence of any threat or inducement, its sufficiency and how it worked in the mind of the accused.

What may amount to inducement, threat or promise was set out in *PP v. Law Say Seck & Ors.* [1971] 1 MLJ 199 Sharma J observed:

> The wording of this section is almost the same as that of section 24 of the Evidence Ordinance. Thus where a confession is obtained from an accused person by the use of any inducement, threat or promise, such confession becomes inadmissible in evidence and any person causing hurt or wrongfully confining any person for the purpose of extorting any confession or information which may lead to the detection of an offence or misconduct may become guilty of an offence under sections 330 or 331 of the Penal Code. The inducement, threat or promise referred to in section 125 is of the same nature and description as is referred to in section 24 of the Evidence Ordinance. Whether any threat or inducement was offered in any particular case is a question of

A fact and has to be decided with reference to the circumstances of each case. If it appears to the court that the statement was caused by any inducement, threat or promise, it must be clear that such a statement is relevant under section 24 of the Evidence Ordinance. In order that an act or omission may amount to an inducement, threat or promise three things must be satisfied:

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(1) One should be able to say that without it the person would not have made a statement. The inducement, threat or promise need not be express but may be implied from the circumstances of the case. If, for example, a person in
C authority says that the truth has come out and that everyone knows about it and tells the accused that he better say what he knows, this itself may amount to a veiled inducement and threat.

(2) It should be such as would make the person suppose that
D the advantage to be gained or evil to be avoided would be of a temporal nature.

(3) It should be sufficient in the opinion of the court to make the accused suppose that he would get the advantage. It is left to the court entirely to form its own opinion as to
E whether an inducement, threat or promise held out in any particular case was sufficient to lead the person to suppose that he would gain an advantage of a temporal nature. In doing so the mind of the person making the statement has to be judged rather than that of the person in authority. In
F scrutinising a case of this kind the court has to perform a threefold function: It has to determine the sufficiency of inducement, threat or promise; it has to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition mentioned in section 24 of the Evidence Ordinance; lastly it has to
G judge as a court if the confession appears to have been caused in consequence of any inducement, threat or promise.

Even at common law, for a confession to be admissible, it must be voluntary ie, it must not have been obtained by threats,
H promises, or oppression etc. In *DPP v. Ping Lin* [1976] AC 674 the House of Lords held that the test for admissibility of a confession was that laid down in *Ibrahim v. R* [1914] AC 599. What may amount to 'inducement' was deliberated by the House of Lords. Lord Morris of Borth-Y-Gest observed:

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> Was it as a result of something said or done by a person in authority that an accused was caused or led to make a statement: did he make it because he was caused to fear that he would be prejudiced if he did not or because he was caused to hope that he would have advantage if he did. The prosecution must show that the statement did not owe its origin to such a cause.

In *Abdullah bin Awang Bongkok v. PP* [1956] 22 MLJ 90, it was held that a confession is admissible if it is made after the inducement is removed. In *PP v. Naikan* [1961] 1 MLJ 147 it was stated the influence of the manager in that case on the accused was not removed. Ismail Khan J (as His Lordship then was) observed:

> There is evidence that the accused on his first arrest was detained for a period of two weeks at the Mantin police station, during which period he made no attempt to volunteer any confession. It was only on 4th March, 1960, after he had seen PW1 and had asked for help, and as a result of the promise given, that he made a statement to PW1 and later to PW3. In my opinion, the two hours interval between the two confessions is too short to have removed the influence he was under at the time he made his confession to PW1 and, in the words of Patteson J, in *R v. Sherrington* [1838] 2 Lewin CC 123, cited in *Roscoe's Criminal Evidence* (16th Edn.) pp. 47, 48 "to allow of the supposition that it was the result of reflection and voluntary determination."

In *Dato Mokhtar Hashim & Anor v. PP* [1983] 2 MLJ 232, the Federal Court to a large extent adopted the common law position in respect of admissions and confessions, and stated even oppression would vitiate confession. Abdoolcader FJ observed:

> No statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement (*Ibrahim v. R* [1914] AC 599, 609 per Lord Sumner)] and this test was accepted by the House of Lords as the correct approach in *Director of Public Prosecutions v. Ping Ling* [1975] 3 All ER 175, [1976] AC 574 in which the House said that is not necessary before a statement is held to be inadmissible because it is not shown to have been voluntary, that it should be thought or held that there was impropriety in the conduct of the [*273] person to whom the statement was made, and that what has to be considered is whether a statement is shown to have been voluntary rather than one brought about in one of the ways referred to. It appears from the decision in Ping Lin (ante) that

A the classic test of the admissibility of an accused's confession that the prosecution must establish beyond reasonable doubt that it was voluntary, in the sense that it was not obtained from him either by fear or prejudice or hope of advantage created by a person in authority, or by oppression, should be applied in a manner which is part objective, part subjective.

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The Privy Council in *Wong Kam Ming v. The Queen* [1980] AC 247, PC, Lord Hailsham of St Marylebone observed:

any civilised system of criminal jurisprudence must accord to the
C judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions. It is therefore
D of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary.

E In *R v. Wilson* [1981] 1 NZLR 316 the New Zealand Court of Appeal held that confessions obtained by overbearing the will of a person in custody by tactics, amounting to compulsion should not be received in evidence and that whether a case is of that kind is a question of fact and degree. The defendant in that case had
F been subjected to prolonged interrogation in the confinement of a small room which was unfair and oppressive and it was held that there was accordingly oppression and the means employed must be regarded as themselves involving a miscarriage of justice.

It is open to an appellate Court to interfere with the finding on a
G question of fact as to the voluntariness of a confession if the impugned finding has been reached without applying the true and relevant legal tests and consideration of relevant matters (*Sarwan Singh v. State of Punjab* (AIR [1957] SC 637, 643); *PP v. Tham Soo Chve* [1954] MIJ 96, 99).

H As we have said the learned Judge wholly discounted the entries in the station diaries on the basis of two wrong entries which have however been explained by Mr Manjeet Singh as not in fact being erroneous. The entries in station diaries which were in fact confirmed by the evidence of Inspector Aziz show prolonged
I periods of interrogation by Inspector Badaruddin and extremely

odd hours of interrogation ranging into the early hours of the morning, in breach of r. 20 of the Lockup Rules. Inspector Badaruddin said in cross-examination as to the latter that he did that because he felt like interviewing the 2nd appellant at that time and that it was the right time to do so but that whenever the 2nd appellant said he did not want to be questioned this request was acceded to and the appellant would be allowed to sleep if he so requested. We think this explanation must be looked at askance and with considerable circumspection as there would hardly be any point in taking a man out for questioning and then abandoning the exercise by acceding to his request. If that was indeed the case, it would perhaps have been more feasible and just as plausible and would have saved a lot of time and trouble, not to mention disappointment to Inspector Badaruddin and obtrusion on the poor man's slumber, to have sent him an invitation to attend for interrogation with a 'rsvp' through bearer. We must stress that what is involved in all this was the systematic interrogation of a detainee, not overtures for friendly poker sessions. On Inspector Badaruddin's evidence, it would seem the 2nd appellant apparently spent the better part of his sojourn in the Gombak Police Station in its conference room and all that he did almost all the time was to eat, sleep and pray as and when he pleased and all this at government expense too!

As to the long hours and odd hours of interrogation stated in the station diaries this would appear to be suggestive of oppression within the definition thereof by Sachs J in *R v. Priestley* [1965] 51 Cr App R I which was adopted in *R v. Prager* [1972] 1 WLR 260. We are told by the Public Prosecutor that this might be the method adopted by the Special Branch, but if we are to approbate and endorse the whims and fancies of interrogators in the systems they choose to utilise. We might as well countenance an interrogator's preference to stand a man on his head or hang him up by his toenails whilst questioning him so as the better to enhance the flow of blood to his cerebral cavity and stimulate his noetic faculties and recollection of past and recent events. We need hardly remind those involved in the interrogation of witnesses, and accused persons that any methods adopted in the process outside accepted norms and standards scrutiny.

In *R v. Priestly (supra)* oppression was defined to mean something, which tends to sap and has sapped that free will which must exist before a confession is voluntary. What may amount to oppressive circumstances was set out in *PP v. Chan Choon Keong* [1989] 2 CLJ 216; [1989] 2 CLJ (Rep) 300. Faiza Thamby Chik JC (as he then was) observed:

A Now back to the cautioned statement. The other point is whether the cautioned statement was obtained under oppressive circumstances. The relevant facts to be looked at and considered to show what are called 'oppressive circumstances' negativing voluntariness are:

B (1) characteristics of the accused;

(2) period of time during which he was questioned;

(3) length of time during which he was in custody;

C (4) whether or not he was given opportunities of rest and refreshment.

[8] For reasons stated above, I take the view that the confession statement ought not to have been made admissible.

D **[9]** Even if I am wrong, I am inclined to agree with the submission of the appellant that there was no independent evidence to corroborate the offence. In such cases, the confession statement must be excluded as its prejudicial effect outweighs its probative value. Support for the proposition can be found in the E Federal Court case of *Goi Ching Ang v. PP* [1999] 1 CLJ 829 where it was stated:

In West Malaysia, the English common law as administered in England on 7 April 1956 applies except where other statutory F provision has been made. See s. 3(1)(a) of the Civil Law Act 1956 which reads:

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:

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(a) in West Malaysia or any part thereof, apply the common law of England and rules of equity as administered in England on the 7th day of April 1956 ... .

The operative part at the commencement of s. 3(1), i.e.: 'Save H so far as other provision has been made or may hereafter be made by any written law in force in Malaysia,' does not, in our opinion, take away the discretionary power to exclude the confessions in appropriate cases since we, relying on the cases cited, have accepted that s. 24 of the Evidence Act 1950 has no application to s. 27 information. That being so, the court is I thrown back on its common law powers.

In *Noor Mohamed v. The King* [1949] AC 182, Lord du Parcq said (at p 192):

> ... in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but *cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.* (emphasis added.)

It is clear from His Lordship's judgment (as emphasized) that there is a vested discretion in a trial judge to exclude evidence which is prejudicial to an accused even though the said evidence may be 'technically admissible'. The general pronouncement made in *Noor Mohamed v. The King* had been followed in numerous other cases in England and is entrenched in the principle that the English court upholds, which is, it is 'a judge's undoubted duty to ensure that the accused has a fair trial ...' (per Lord Salmon in *R v. Sang* [1980] AC 402 at p 445.)

Noor Mohamed v. The King was consistently adopted in Malaysia, see eg, *Kan Sik Fong v. PP* [1961] MLJ 163; *PP v. Haji Kassim* [1971] 2 MLJ 115 (FC); *Rauf bin Haji Ahmad v. PP* [1950] MLJ 190; *Tan Geok Kwang v. PP* [1949] MLJ 203.

In *Kurumason of Kaniu v. R* [1955] 1 All ER 236 (PC), Lord Goddard CJ, relying on *Noor Mohamed v. R* [1949] 1 All ER 365 at p 370 and *Harris v. Director of Public Prosecutions* [1952] 1 All ER 1044 at p 1048 said (at p 239):

> No doubt in a criminal case, the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

Further, the legal jurisprudence in respect of confession statement at this period of time and age has advanced to say that confession statement by itself cannot be made the foundation of a conviction nor could it be used to fill in gaps in the prosecution evidence. It must be asserted that confession statement can only be used to

A lend assurance and to support other evidence when the accused objects to its voluntariness but is made admissible according to law. For, in such circumstance, the burden of proof to prove the case beyond reasonable doubt in my view will not be satisfied. (See my judgment delivered on 18 June 2007 in CRA 41-20-2006-
B II *PP v. Mohd. Aszzid Abdullah*).

[10] For reasons stated above, I allow the appeal and set aside the conviction and sentence of the learned sessions judge dated 23 May 1996. I hereby order so.

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